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200439—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 153

JOHN J. CHICKERING, ADMINISTRATOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 82–87) is unreported. The opinion of the Circuit Court of Appeals (R. 97–107) is reported in 118 F. (2d) 254.

JURISDICTION

The decision of the Circuit Court of Appeals was entered on March 13, 1941 (R. 107). The petition for a writ of certiorari was filed on June 11, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent and other members of her family created a family trust in 1901, providing that upon the death of the decedent, the income of her share was to go to her issue. Decedent, in common with other grantors, retained the power, exercisable by deed, (1) to create a life estate in favor of her husband in all or any part of the income; (2) to apportion income and corpus as she saw fit among her children, and (3) to disinherit her children wholly or partially in favor of the trust. Decedent died in 1935 leaving one child surviving her. The question is whether decedent's interest in the trust is includable in her gross estate under Section 302 (d) of the Revenue Act of 1926.

STATUTE INVOLVED

Revenue Act of 1926, Sec. 302, c. 27, 44 Stat. 9 (26 U. S. C. § 411):

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date

of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death but after the enactment of this Act without such a consideration and affecting the interest or interests (whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall be deemed and held to have been made in contemplation of death within the meaning of this title;

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and reliquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

STATEMENT

The facts, which were stipulated (R. 74–81) and found by the Board as stipulated (R. 82), may be summarized as follows:

The decedent's father, William A. Russell, died intestate in 1899. He was survived by his widow and five children. Under the Massachusetts laws of intestacy the widow was entitled to 33⅓% of the estate and each child was entitled to 13⅓% of the estate. (R. 76–77.)

In 1901 the widow and children created the William A. Russell Trust and conveyed to it all of the property which they had inherited. The trust was to continue for 21 years after the death of the last survivor of a group which included all of the grantors, but it could be revoked or amended by the unanimous consent of all the surviving grantors and the eldest child of any deceased grantor. The trust deed was amended on a number of occasions but no amendment material for present purposes was made after 1918. (R. 76–77, 83.)

The deed of trust, as amended, provided that the widow should receive 20% of the income of the trust during her life but that she should have no interest in the principal. Upon her death, her share of the income was to be divided among the other beneficiaries of the trust. Each child was to receive 16% of the income for life. Upon the death of any child, the income from his or her

share was to go to his or her issue *per stirpes*, or, if there were no issue, the income was to go to the deceased child's spouse for life. Upon termination of the trust, the corpus was to be distributed among the persons receiving the income at that time in the same proportions in which they were receiving the income, unless their parents had provided otherwise. (R. 82–84.)

The trust deed, as amended, further provided that the decedent, in common with the other grantors of the trust except the widow, had the power (1) to create a life estate in favor of her husband in all or any part of the income, (2) to apportion income and corpus as she saw fit among her children, and (3) to disinherit her children wholly or partially in favor of the trust. By amendment in 1910, this power was made exercisable by deed alone. (R. 83–84, 32–34, 53.)

One of the decedent's brothers predeceased her, leaving a widow surviving him. The decedent's mother, William A. Russell's widow, also predeceased the decedent. Accordingly, at the time of the decedent's death in 1935, decedent was entitled to 21% of the income of the trust, instead of the 16% which she had originally received. She also had a remainder interest in her deceased brother's share after the life interest of his widow. (R. 77–78, 83.)

Decedent was survived by an adult son, but her husband had predeceased her (R. 74–75). Conse-

quently, at the time of her death her power over the devolution of her interest amounted to a power by deed to cut her son off from the whole or any part of her share of the income or principal. Any amount so cut off would automatically have been subject to distribution among the other beneficiaries in accordance with the other provisions of the trust deed. Decedent never exercised this power, however, so her entire beneficial interest passed to her son (R. 84).

In computing decedent's estate tax, the Commissioner included in her gross estate an amount representing the value of 21% of the corpus of the trust at the date of the decedent's death, and another amount representing the value at that time of decedent's remainder interest in her deceased brother's share of the trust (R. 75, 84). Petitioner filed a petition for review with the Board of Tax Appeals, contending that nothing should be included in the gross estate on account of decedent's interest in the trust, and, in the alternative, that if any amount should be included, it should be no more than 13⅓% of the corpus of the trust, the percentage which decedent originally transferred in trust (R. 84). The Board of Tax Appeals held that the value of 13⅓% of the corpus of the trust was includable in the gross estate and determined a deficiency of $125,856.69 accordingly (R. 87). Upon appeal by the taxpayer, the court below affirmed (R. 107).

ARGUMENT

1. The decision below is manifestly correct and accords with the decisions of this Court and of other circuit courts of appeals.

The trust indenture provided that decedent should have power to create a life estate in favor of her husband in all or any part of the income, to apportion income and corpus as she saw fit among her children, and to disinherit her children wholly or partially in favor of the trust. Since only a son survived her, the power to create a life estate in favor of the husband and to apportion income or corpus among the children was of no practical value to decedent at the time of her death. She did, however, have the power to cut off her son entirely or to leave him any portion she saw fit of her share of the trust corpus and income. This, of course, gave her power to effect a complete change in the devolution of her share of the trust property by giving it, in whole or in part, to the other beneficiaries of the trust rather than to her son.

The retention of such a power brings the trust within the clear language of Section 302 (d) of the Revenue Act of 1926, which requires merely that the enjoyment of the trust property be subject at the date of "death to *any* change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter, amend, or revoke * * *." [Italics supplied.] It is

immaterial that the decedent could not exercise the power in her own favor. *Porter* v. *Commissioner*, 288 U. S. 436; *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157 (C. C. A. 2d), certiorari denied, 299 U. S. 552; cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39, 42. Nor does Section 302 (d) contain any requirement that the class of persons for whose benefit changes may be made shall be unrestricted. It is sufficient that the devolution of the property be subject to substantial modification. *Commissioner* v. *Chase National Bank, supra; Holderness* v. *Commissioner*, 86 F. (2d) 137 (C. C. A. 4th); see *Hoblitzelle* v. *United States*, 3 F. Supp. 331, 333–334 (Ct. Cls.).

The decision below is in full accord with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Chase National Bank*, 82 F. (2d) 157, where it was held that the retention of a power to alter the proportions in which the decedent's three children would take the trust property was sufficient to bring the trust within the provisions of Section 302 (d). A petition for certiorari filed by the taxpayer in the *Chase National Bank* case was denied by this Court (299 U. S. 552); every reason which led to the denial of the writ in that case seems equally applicable here.

2. There is not, as alleged by petitioner (Pet. 6), a conflict with *Helvering* v. *Helmholz*, 296 U. S. 93. There the decedent had made a transfer in trust,

naming herself as one of the beneficiaries and reserving to herself, as a beneficiary, the right to join with all the other beneficiaries in terminating the trust. This Court held that such a power was not to be considered as a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). Plainly, that holding is not opposed to the conclusion of the court below, for, to the extent that the right to recall in that case was conditioned upon the consent of all the beneficiaries, the transfer was in effect an absolute one.

Petitioner refers (Pet. 10) to the fact that the trust deed involved in the *Helmholz* case gave the decedent a right to create a life interest in the income of the trust property through appointment by will. The petition points out that, although the decedent in the *Helmholz* case did appoint to her husband for life and thus did to a limited extent change the devolution of the property, this Court held that none of the trust property was includable in her gross estate. However, as shown by the opinion of the Court of Appeals for the District of Columbia (*Helvering* v. *Helmholz*, 75 F. (2d) 245 at 248), the Commissioner did not appeal the Board's holding that the life interest in the income of the trust estate appointed to the husband should not be included in the decedent's gross estate, and examination of the briefs filed in this Court shows that no argument was made here that either the existence or exercise of the power of appointment

brought the trust property within Section 302 (d). The holding in that case must be confined, therefore, to the issue actually decided, namely, that the power of a grantor, who is also a beneficiary, to join with the other beneficiaries in terminating the trust is not a power to "alter, amend, or revoke" the trust within the meaning of Section 302 (d). Moreover, these additional facts with respect to the *Helmholz* case were called to this Court's attention in the petition for certiorari in the *Chase Bank* case, *supra,* and certiorari was denied.

3. Petitioner urges that Section 302 (d) would be unconstitutional because of retroactivity if applied to the present trust, which was created in 1901. But the decedent retained control over the devolution of the property up to the time of her death, which occurred after the enactment of the statute. The termination of that power upon her death for the first time assured her son that he would succeed to decedent's share of the trust. In these circumstances, the statute does not have retroactive application. Cf. *Porter* v. *Commissioner,* 288 U. S. 436; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 43; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 345; *Gwinn* v. *Commissioner,* 287 U. S. 224. As this Court has said, a "tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States* v. *Jacobs,* 306 U. S. 363, 367.

Petitioner is in error in asserting that the decedent could not have relinquished the power reserved to her. She did not hold this power in trust, and a relinquishment would not have amounted to an amendment of the trust or have required any act beyond the powers which she could exercise. The generally accepted rule that a grantor may relinquish powers reserved in a trust instrument during life as well as at death is obviously the premise on which the decisions in *Estate of Sanford* v. *Commissioner, supra,* and *Burnet* v. *Guggenheim,* 288 U. S. 280, are based.

CONCLUSION

There is no conflict in the decisions and no novel question is involved. The decision of the lower court is manifestly correct. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
RICHARD H. DEMUTH,
LOUISE FOSTER,
Special Assistants to the Attorney General.

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